Supreme Court, U.S.
FILED
JUN 25 2001
OFFICE OF THE CLERK

(3)

No. 00-1526

In The

Supreme Court of the United States

DORA GARCIA CISNEROS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER CISNEROS

DAVID L. BOTSFORD
Counsel of Record
SHEINFELD, MALEY & KAY
301 Congress Ave., Suite 1400
Austin, Texas 78701
512/474-8881 (phone)
512/474-2337 (Fax)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY TO GOVERNMENT'S "STATEMENT" 1

REPLY TO GOVERNMENT'S "ARGUMENT" 3

A. Section 1 Of The Government's "Argument" (Govt. Br. at 21-22) 3

B. Sections 2 And 3 Of The Government's Argument (Govt. Br. at 22-27) 5

C. Section 4 Of The Government's Argument (Govt. Br. at 27-29) 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) 5

Erlenbaugh v. United States, 409 U.S. 239 (1972) 6

Grunewald v. United States, 353 U.S. 391 (1957) 9

In re Winship, 397 U.S. 358 (1970) 3

Pereira v. United States, 347 U.S. 1 (1954) 7

Rewis v. United States, 401 U.S. 808 (1971) 6, 7

Toussie v. United States, 397 U.S. 112 (1970) 8, 9

United States v. Gaudlin, 115 S.Ct. 2310 (1995) 3

United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996) 6

United States v. Manges, 110 F.3d 1162 (5th Cir.), *cert. denied*, 523 U.S. 1106 (1998) 9

United States v. Sneed, 63 F.3d 381 (5th Cir. 1995) 7

Statutes

18 U.S.C. § 1952 6

18 U.S.C. § 1958 .....3, 5, 7, 8, 9, 10

REPLY TO GOVERNMENT'S "STATEMENT"

The Government's "Statement" concerning Cisneros is contained at pages 2 through 8 of its Brief.

First and foremost, the Government has failed to recognize or acknowledge that this was essentially an intrastate scheme where all of the participants lived in Texas and all acts in furtherance of that alleged scheme occurred in Texas. Govt. Brief at 2 to 8. As noted in Cisneros' certiorari petition at page 5, the indictment and bill of particulars only reflect two evidentiary bases to potentially sustain federal jurisdiction: (1) Daniel Garza's four alleged phone calls made from Mexico[1] to Maria Martinez in Brownsville (i.e., Garza's "curandera", the alleged go-between between Garza and Cisneros), all of which occurred on unspecified dates prior to February 14, 1993; and (2) entry by an automobile from Matamoros, Mexico, to Brownsville, Texas, on March 2, 1993.[2]

As to the first potential jurisdictional basis, the Government has been less than precise in its rendition of the facts. First, at page 3 of its Brief, the Government asserts, *sub silentio*, that the conversations between Garza and Martinez which Garza placed from Mexico all occurred after early 1993, a date Martinez told Garza that she no longer wanted Fischer hurt, but killed. In fact, the dates of the four calls from Garza to Martinez from Mexico are absolutely unknown, other than that all of those four alleged calls occurred before Garza found the alleged "hit"

---

[1] Garza lived in San Antonio, Texas, 11R1355, 1400, 1419, but had traveled to Mexico to see family members, 11R1402-1403, and harvest land, 11R1422. His travel into and out of Mexico was clearly unrelated to any alleged scheme either to hurt or kill Joey Fischer.

[2] As noted in Cisneros' petition at pages 6 and 15 to 16, the first and second panel opinions addressed the foreign telephone calls and mentioned the vehicle crossing, but avoided resolution of the automobile entry as a "more complicated issues." *See* Pet. App. 18; Pet. App. 50.

men in Dallas on February 14, 1993. As pointed out in Cisneros' petition at page 6, footnote 1, the Government conceded in the Fifth Circuit that all four of Garza's calls from Mexico to Martinez were made prior to February 14, 1993, but otherwise, the dates of the calls were not established. It must be realized that Garza testified that Martinez mentioned having Fischer killed "around the end of January, beginning of February" of 1993, while he was physically present in Martinez's house in Brownsville. 11R1363. Thus, prior to that meeting in Martinez's house in Brownsville, all conversations between Garza and Martinez had focused upon Garza finding someone to beat up or hurt Fischer. Additionally, Garza called Martinez from locations other than in Mexico, and all of the telephone calls (including the four foreign calls) were in late 1992 or early 1993. 11R1364-1366. Garza's lies to Martinez (during these telephone calls) were in reference to "the men, the guys that she wanted to cause harm to this boy." 11R1365. Garza never once testified, contrary to the Government's statement at page 3 of its Brief, that Garza told Martinez that he had found someone to "kill" Fisher, merely to perform some harm to him. 11R1365. Garza made it crystal clear that he had never told anyone to kill the boy, 11R1437-1439, and that this was in fact what he had told the "hit" men in Dallas on February 14, 1993. *Id.* The point is that the Government has incorrectly *assumed* that during at least one of the four calls allegedly placed by Garza to Martinez from Mexico, Martinez asked Garza about a murder for hire, when in truth and in fact, it is totally unclear whether Martinez asked Garza about beating Fisher up or about killing Fisher. This logically follows because it was not until "around the end of January, beginning of February," while Garza was physically present in Martinez's house in Brownsville, that Martinez switched from wanting to hurt the boy to wanting to kill the boy. 11R1363.

As to the second potential jurisdictional basis, the Government's rendition of the facts at pages 3-4 of its Brief also conveniently overlooks the fact that Olivarez and Pizana worked in *Dallas, Texas,* for the Cuellar crime gang

and that the next time *they went to Brownsville from Dallas*, they would perform the job. Additionally, the Government insinuates that after Garza met Olivarez at the La Quinta Inn in Brownsville on the afternoon of March 2, 1993, the car with Mexican license plates crossed into the United States at 6:39 p.m. and that Pizana and Palomares checked into the La Quinta at 8:26 p.m., thus creating the impression that Pizana and Palomares crossed the border in that car. In fact, there is no evidence who was in the vehicle that crossed the border or why it crossed the border. The Government also conveniently ignores the fact that Garza identified two cars at the La Quinta on March 3, 1993, a suburban and a white Ford, and that he expressly testified that he did not know where the operators of those cars had come from. 11R1417.

REPLY TO GOVERNMENT'S "ARGUMENT"

The Government's "Argument" concerning Cisneros is contained at pages 20 to 29 of its Brief.

A. Section 1 Of The Government's "Argument" (Govt. Br. at 21-22)

Cisneros asserted in her petition (at pages 17 to 21) that 18 U.S.C. § 1958 must be interpreted as requiring, if not intent, something more than "but-for causation" and "foreseeability" and that these must be embodied within the jury instructions and sufficiency review to ensure due process under *In re Winship*, 397 U.S. 358 (1970) and *United States v. Gaudlin*, 115 S.Ct. 2310 (1995). Cisneros pointed out that her requested jury instructions, none of which were given, would have ensured that result.

The Government's observation that the court's jury instruction was not objected to (Govt. Br. at 21) ignores Cisneros' proposed jury instructions and the court's observation that "you preserve everything that I did inconsistent with what you favored me with (i.e., inconsistent with

all defensive requested instructions). 11R1520-1521.[3] Accordingly, a plain error review is not appropriate.

Moreover, the Government also ignores the fact that the court failed to limit the jury instructions in accordance with the evidence and the Government's bill of particulars. The bill of particulars, filed voluntarily by the Government without any court order, stated:

> "The evidence in this case will show that, in regards to foreign travel, that Heriberto Pizana and/or other persons unknown travelled from Mexico to Brownsville, Texas, via an international bridge on or about March 2, 1993."
>
> * * *
>
> "The evidence in this case will show, in regards to use of telephone communications facilities in foreign commerce, that Daniel Garza used telephone facilities in San Fernando, Tamaulipas, Mexico, and in Matamoros, Tamaulipas, Mexico, to call Maria Martinez in Brownsville, Texas, from in or about November 1992 to in or about February 1993."

The evidence essentially matched the Government's bill of particulars, although Cisneros disagreed that the evidence was sufficient as to either jurisdictional basis. The court's instruction that "[b]ut the Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce", 11R1516, deviated not only from the evidence, but also from the bill of particulars, a realization totally overlooked by the Government.

---

[3] Earlier, the court had stated "[a]nything that I do that is inconsistent with what you have filed of record, you need not object to. You will preserve your exception. So you need not object to anything that you have already favored me with that I do inconsistent with respect to the charge I give to the jury." 11R1495-96. The court reiterated that same message at 11R1499-50.

B. Sections 2 And 3 Of The Government's Argument (Govt. Br. at 22-27)

Sections 2 and 3 of the Government's "Argument" at pages 22 to 27, responds to pages 17 to 25 of Cisneros' petition.

Therein, Cisneros raises, *inter alia*, the propriety of the refusal of her requested jury instructions nos. 12 and 15A, which are quoted in her petition at page 8, footnote 4 and page 11, footnote 7.

These instructions were designed to operate in conjunction with one another and to have the jury instructed on two essential concepts, to wit: that the Government had to prove, and the jury had to find, that the travel or telephone calls were in furtherance of or facilitated the alleged murder for hire scheme (as opposed to the original scheme to beat Fischer, which Garza had testified was only modified in late January or early February 1993), and that the travel or telephone calls were not merely fortuitous, incidental or happenstance (i.e., something more than "but-for causation").

While the Government attempts to minimize the legal significance of Cisneros' challenges on the basis that these requested charges were technically imprecise, it fails to refute the necessity of proof beyond a reasonable doubt and jury instructions on both of these core concepts in a proper prosecution under Section 1958. And, of course, absent an allegation, proof and appropriate jury instructions on both of these concepts, the very essence of due process if violated. *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

Indeed, the Fifth Circuit recognized the need for appropriate proof and jury instructions on both of these concepts, but overruled Cisneros' challenges because: (1) the words "in furtherance" should have been "facilitated", ignoring Cisneros' citation of cases which equated the two

terms,[4] Pet. App. 49, 54; (2) Garza's four calls from Mexico to Martinez created a sufficient nexus between the use of the foreign telephone and the alleged murder for hire scheme because "[w]ithout Martinez's incessant reminders during those calls, it is reasonable for a jury to have believed that Garza would not have made as serious an effort to find a hit man," Pet. App. 49; and (3) because Cisneros had confused intent and causation. Pet. App. 56.

As noted above in footnote 4, *supra*, there is no difference between the two – "in furtherance" and "facilitate" – have been used interchangeably in prosecutions under the Travel Act, 18 U.S.C. § 1952, from which the murder for hire statute was formulated. Clearly, the court was on notice of Cisneros' desire to have the jury instructed on the concept and this Court should grant certiorari to clarify that a defendant is entitled to an allegation, proof and an appropriate jury instruction to avoid a violation of the Commerce Clause.

Unfortunately, the jury was not instructed, in any manner, that there were any limitations upon its ability to convict if it found that there was foreign travel or foreign telephone calls. No restriction was put on the jury that such calls had to even be related to the alleged murder for hire scheme, only that "somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce." 1R83, 11R1516, 12R1593-94. The Government fails to address the due process ramifications of this serious omission, and it cannot seriously be argued that fortuitous and incidental travel or telephone calls are constitutionally permissible as a basis for conviction.

While Cisneros may have intermixed causation and intent, her requests were more than sufficiently clear. The

---

[4] *See, e.g.*, cases cited at pages 22 to 23 of Cisneros' petition, including *Erlenbaugh v. United States*, 409 U.S. 239, 247 (1972) (furtherance); *Rewis v. United States*, 401 U.S. 808, 813 (1971) (furtherance); *United States v. Houlihan*, 92 F.3d 1271, 1292 (1st Cir.1996) (furtherance).

requested instruction on causation relied upon cases in support of the mail fraud statute and were expressly cited to the court (i.e., *United States v. Sneed*, 63 F.3d 381 at 385 n.4 (5th Cir. 1995), quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954)). The jurisdictional basis of the mail fraud statute (i.e., use of the mail) is also included within the jurisdictional bases of the murder for hire statute and consistent with this Court's decision in *Rewis v. United States*, 401 U.S. 808 (1971), where this Court determined that something more than "but-for" causation was required under the Travel Act.

C. Section 4 Of The Government's Argument (Govt. Br. at 27-29)

Regarding section 4 of the Government's "Argument" (pages 27 to 29 of its Brief), the Government opines that there is not a real conflict between the Fifth Circuit's conclusion that, for purposes of the applicable statute of limitations, Section 1958 is a continuing offense and circuit and district court cases cited by Cisneros (all of which expressly state that an offense under Section 1958 is complete upon the use of the interstate commerce facility with the requisite intent). This opinion is advanced by the Government because none of the cases relied upon by Cisneros actually addressed the statute of limitations. While the Government is correct in its observation that none of these cases actually decided a statute of limitations issue, the fact that any number of prior courts have so stated only serves to highlight the need for this Court to define the proper parameters of the statute and thus determine whether the substantive offense of "murder for hire" is a continuing offense or not. Where a promise to pay and an actual payment are both made, and the foreign or interstate commerce nexus is satisfied after the promise but before the payment, does a subsequent payment extend the offense? As argued by Cisneros at page 27 of her petition, the actual "receipt of pecuniary value" only completes the crime when it occurs simultaneously with

satisfaction of the interstate nexus because, neither an actual murder or remuneration are necessary to satisfy the statute. The Government utterly fails to respond to this argument and the fact that the statute does not even require a murder or the payment of renumeration before an offense is committed.

It should also be noted that the Government has totally failed to respond to Cisneros' reliance upon express language contained in the legislative history, which clearly supports Cisneros' position (as well as the statements contained in the cases cited in her petition).

Interestingly, the Government has noted the 1994 amendment to Section 1958. Govt. Brief at page 28, n. 16. As noted by the Government in its footnote, the 1994 amendment added the potential penalty of death. However, the Government has failed to acknowledge that this same amendment also inserted into Section 1958 a prohibition against conspiring to commit "murder for hire." See Pub. L. No. 103-322, § 60003(a)(11), 108 Stat. 1969. This amendment fully supports the original legislative history to the effect that Section 1958 was not intended to be a continuing offense, since it is impossible for only one person to commit the substantive offense of "murder for hire."[5]

The Government appropriately notes that *Toussie v. United States*, 397 U.S. 112 (1970) explained that continuing offenses are an exception to the general rule and that *Toussie, supra* at 115, provides that a crime is a continuing one when "its language *** compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* Cisneros agrees with the Government's

---

[5] After all, the offense of causing someone to travel in interstate or foreign commerce or causing someone to use the mail or any facility in interstate or foreign commerce with intent that a murder be committed as consideration for the receipt of or as consideration for a promise or agreement to pay anything of pecuniary value cannot be committed by one person.

rendition of *Toussie*, but disagrees with the application of *Toussie* to Section 1958.

Cisneros asserts that *Toussie* supports her position that Section 1958 is not a continuing offense. This assertion, contained at pages 26 to 30 of her petition, is also buttressed by the realization that the language of Section 1958, as it existed in 1993, clearly compels the conclusion that it was not a continuing offense. The current language also compels that same conclusion.

Additionally, as noted above and fully reflected in her petition at pages 28-29, the legislative history also clearly reflects that Congress did not intend Section 1958 to be a continuing offense.[6] Thus, application of both prongs of *Toussie* support Cisneros' position.

Recourse to the mail fraud statute, 18 U.S.C. § 1341 is instructive, because it has a similar type of jurisdictional nexus (i.e., use of the United States mail). Under Section 1341, the statute of limitations runs from the date of the last mailing in furtherance of the scheme and artifice to defraud. *United States v. Manges*, 110 F.3d 1162, 1169 (5th Cir.), *cert. denied*, 523 U.S. 1106 (1998). As to a conspiracy to commit mail fraud, a continuing offense, the statute of limitations runs from the date of the last overt act in furtherance of the conspiracy committed by any co-conspirator. *See Grunewald v. United States*, 353 U.S. 391, 396-97 (1957). A scheme to commit a "murder for hire" is no more a continuing offense than a scheme and artifice to defraud. Accordingly, Section 1958 is not a continuing offense and this Court should grant certiorari to resolve this issue.

Finally, the Government's suggestion that the evidence of international travel within the five year statute of

---

[6] It is noteworthy that the Government cites only one statute which has been declared to be "continuing" under *Toussie*, to wit: 18 U.S.C. § 751(a), and does not list all of the statutes which are arguably "continuing." At page 29, note 15, Cisneros cited a leading commentator who opined that a large number of offenses were continuing ones, but that list did not include Section 1958.

limitations renders Cisneros' issue unworthy of certiorari review ignores two significant factual matters. First, both panel opinions expressly declined the opportunity to address the international travel as it was a "more complicated issue" (although the *en banc* opinion factually recited that the "hit" men came from Mexico, a clearly erroneous interpretation of the facts). Second, the jury's note at 1:45 p.m. during its deliberations asking whether it had to find both foreign telephone calls and foreign travel, or whether it could find just one or the other, 2R75, 12R1602-1609, clearly reflects the realization that the jury was unable to find both foreign telephone calls and foreign travel. In fact, the court's response to that note at 2:12 p.m., informing the jury it only had to find one or the other, not both, was given to the jury a mere 23 minutes before the jury announced at 2:35 p.m. that it had reached a verdict. 2R73. Finally, it should be noted that if this Court were to grant certiorari and interpret Section 1958 in a manner consistent with Cisneros' position, the Government would still be allowed to retry Cisneros based upon the alleged international travel on the evening of March 2, 1993. This conclusion follows because no court has ever declared the evidence insufficient as to that second potential jurisdictional basis, and therefore there would not be any double jeopardy bar to a retrial relying upon this potential jurisdictional basis.

CONCLUSION

Cisneros' petition affords this Court with an excellent opportunity to provide guidance to the lower courts regarding the proper interpretation of the "murder for hire statute", 18 U.S.C. § 1958. Meritorious and important questions regarding the jurisdictional nexus, causation, jury instructions and the statute of limitations are presented by Cisneros' petition. Certiorari should be granted.

Respectfully submitted,

DAVID L. BOTSFORD